Supreme Court, U.S.
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No. 97-1853

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF OHIO,
Petitioner,

-vs-

LAMONT L. HOLT,
Respondent.

On Petition for a Writ of Certiorari to
the Ohio Court of Appeals, Tenth Appellate District

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

1. In light of ***United States v. Salvucci***, 448 U.S. 83 (1980), whether a criminal defendant can rely on the prosecution's theory of the case to meet the defendant's burden of proving that he held a legitimate expectation of privacy in the area searched.

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ARGUMENT

A CRIMINAL DEFENDANT CANNOT RELY ON THE PROSECUTION'S THEORY OF THE CASE TO MEET HIS BURDEN OF PROVING THAT HE HELD A LEGITIMATE EXPECTATION OF PRIVACY IN THE AREA SEARCHED.

Respondent asserts that this Court lacks jurisdiction because the Ohio Court of Appeals, Tenth Appellate District, based its "standing" determination on Article I, Section 14, of the Ohio Constitution. However, given the Tenth District's references to federal law, this Court would lack jurisdiction only if the Tenth District set forth a plain statement that it was basing its ruling independently on the Ohio Constitution. ***Michigan v. Long***, 463 U.S. 1032, 1044 (1983). In the present case, the Tenth District made no such "plain statement."

Respondent misreads the Tenth District's opinion when he contends that the Tenth District was relying on the Ohio Constitution to reach its standing determination.

In addressing the question of standing, the Tenth District relied on the Fourth Amendment of the United States Constitution, mentioning that Amendment four times. The Tenth District also expressly relied on two decisions of this Court: ***Alderman v. United States***, 394 U.S. 165 (1969), and ***Rakas v. Illinois***, 439 U.S. 128 (1978). In addressing the standing issue, the Tenth District never mentioned the Ohio Constitution and never cited any Ohio case law.

When petitioner Ohio filed its motion for reconsideration and pointed out the flaws in the Tenth District's analysis, the Tenth District even then did not avail itself of reliance on the Ohio Constitution. The Tenth District may have shied away from relying on the Ohio Constitution because there is probably no exclusionary rule for violations of Article I, Section 14, of the Ohio Constitution, a fact pointed out by petitioner Ohio in its motion for reconsideration. *See* ***State v. Lindway***, 131 Ohio

St. 166, 2 N.E.2d 490 (paragraphs four, five, and six of syllabus), *cert. denied* and *appeal dismissed*, 299 U.S. 506 (1936). Moreover, at the time the Tenth District denied reconsideration, a recent Ohio decision stated that the search-and-seizure protections afforded by the Ohio and United States Constitutions are generally coextensive. ***State v. Robinette***, 80 Ohio St.3d 234, 238-39, 245, 685 N.E.2d 762, 766-67, 771 (1997).

Respondent contends that the Tenth District relied on the Ohio Constitution in another part of its opinion. To be sure, the Tenth District quoted the syllabus language of ***State v. Brown***, 63 Ohio St.3d 349, 588 N.E.2d 113, *cert. denied*, 506 U.S. 862 (1992), but the Tenth District did so only when it discussed the legality of Officer Rhodeback's search. ***Brown*** has no relevance to the standing issue being raised here.

Even if the Tenth District's quotation from ***Brown*** had relevance, that quotation cited ***both*** the Ohio constitutional provision and the Fourth Amendment. This single, passing reference to the Ohio constitutional provision was insufficient to satisfy the "plain statement" requirement, since the Tenth District's opinion otherwise relied on federal law by referring to ***Alderman***, ***Rakas***, and the Fourth Amendment. ***Ohio v. Robinette***, 117 S.Ct. 417, 420 (1996); ***New York v. P.J. Video Inc.***, 475 U.S. 868, 872 n. 4 (1986); ***New York v. Class***, 475 U.S. 106, 109-110 (1986); ***Michigan v. Long***, 463 U.S. at 1040-44.

Respondent errs in relying on parts of Justice Wright's opinion in ***Brown***. First, the Tenth District never relied on that language from Justice Wright's opinion in ***Brown***. The Tenth District instead relied on the *syllabus* of ***Brown***, which referred to the Fourth Amendment. Second, respondent fails to take into account the recent Ohio decision

treating these federal and state constitutional provisions as generally coextensive. ***State v. Robinette, supra***. This latter decision casts some doubt on the *dicta* set forth in Justice Wright's opinion in ***Brown***.

The Tenth District did not plainly state that it was basing its determination of "standing" on the Ohio Constitution. Instead, the Tenth District relied on federal law. As a result, this Court has jurisdiction.

CONCLUSION

Petitioner State of Ohio respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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